91-564

No. _____

In The

Supreme Court of the United States

October Term, 1991

ALEXANDER MICHAEL BUTCHER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 2, 1991

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 18 USC § 2314 (interstate transportation of stolen or converted funds) can be violated where the funds in question are determined by the Court of Appeals to have been converted by Petitioner in another state and after first being transmitted in interstate commerce?

2. Whether 18 USC § 1341 (mail fraud) can be violated where the funds in question, which the Court of Appeals found were due to a limited partnership, were received by the sole general partner of such limited partnership, but were not thereafter distributed to the individual partners?

3. Whether Petitioner's convictions under 18 USC § 2314 and 18 USC § 1341 violated his rights under the Fifth and Sixth Amendments to the U.S. Constitution where the limited partnership named in the indictment as the purchaser of the investment in question, and owner of the funds distributed, was not in fact either the purchaser of the investment or the owner of the funds, because such limited partnership was not in existence until more than two years after the date the indictment alleges that it purchased the investment at issue?

4. Whether, in a multiple count prosecution, Petitioner's acquittals on Counts One and Two, which relate to acts and conduct which occurred first in time and which acts and conduct were included in all subsequent counts, constitute acquittals or implied acquittals as to the remaining counts, under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as interpreted by this Court in *Green* v *U.S.*, 78 S.Ct. 221 (1957); and, *Grady* v *Corbin*, 110 S.Ct. 2084 (1990)?

QUESTIONS PRESENTED FOR REVIEW – Continued

5. Whether Petitioner's convictions "for wrongfully converting" funds violated his rights under the Fifth and Sixth Amendments to the United States Constitution, in that Petitioner was never charged with wrongfully or illegally converting the funds in question?

PARTIES

The Petitioner in this Court is Alexander Michael Butcher, who was the defendant in the proceedings below. Respondent is the United States of America.

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OTHER AUTHORITIES

Petitioner Alexander Michael Butcher respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Sixth Circuit Court of Appeals entered in this proceeding on May 23, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals For The Sixth Circuit was not recommended for full text publication. It is reprinted in the Appendix hereto at 1.

The opinions of the United States District Court for the Eastern District of Michigan, which are not reported, are set out in the Appendix hereto at 7 and 10.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on May 23, 1991. App. 1. A timely motion for rehearing was denied on July 9, 1991. App. 13. This petition is filed within 90 days of the order denying rehearing.

The jurisdiction of this Court to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 USC § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States, 18 USC § 1341 and 18 USC § 2314.

STATEMENT OF THE CASE

IN GENERAL

Alexander Michael Butcher, Petitioner herein, is a Michigan attorney. Continuing through approximately calendar year 1972, Petitioner Erwin Rubenstein ("Rubenstein"), and Jerome J. Allen ("Allen") practiced law as a professional corporation under the name of Rubenstein, Butcher and Allen, P.C.,

in Oakland County, Michigan. Each lawyer is expert in federal and state tax matters. During the period they practiced law together, they acquired various investments, approximately 10 in number, usually holding each investment in a separate partnership. Usually, if not always, the investment partnership name included the acronym RBA.

This action involves two investment partnerships among the law firm principals, each partnership bearing the identical name of RBA Investments. The first RBA Investments was a Michigan co-partnership which was formed in July of 1972 and dissolved in 1974. The second RBA Investments was a Michigan limited partnership, which was formed on October 31, 1974 and which continued at least through December of 1987. Use of the terms "RBA" or "RBA Investments" herein refer to RBA Investments **limited partnership,** which is the RBA entity referred to in the indictment.

RBA Investments **co-partnership** and Petitioner acquired interests in Flint-Woodcrest Apartments Limited Partnership ("FWALP") in July of 1972. FWALP was dissolved in 1987. As part of the dissolution, it made one partial distribution of its assets to each of its partners in 1986. It made a second and final distribution to each of its partners in 1987.

Petitioner was convicted, under 18 USC § 2314, of the interstate transportation of the proceeds of the 1986 distribution (Counts V and VI), even though he was acquitted of the charges contained in Counts I and II that he violated 18 USC § 1341, the mail fraud statute, that he wrongfully attempted to obtain such proceeds through use of the mails. He was convicted of obtaining and/or converting the 1987 distribution, in the amount of $19,105.52 because, in response to an inquiry by the FWALP distributing general partner, Alfred Klein, he directed, App. 44, Mr. Klein to send the RBA check to him as the sole general partner of RBA (Count III); he was convicted of mail fraud (Count IV) because the check for $19,105.52 was transmitted via U.S. Mail by Mr. Klein. The Sixth Circuit Court of Appeals dismissed Petitioner's conviction under Count VII, in which the Government asserted that the mailing of the check from Florida by Mr. Klein to Petitioner in

Michigan, at his direction, was somehow a violation of § 2314, the court holding that there was no evidence to indicate that the funds were stolen at the time they were transported, i.e., sent by Mr. Klein, in interstate commerce. App. 5.

With the break-up of the law corporation in the latter part of 1972, the attorneys began a process, lasting perhaps 24 months, of dividing the various investments held by them. In the words of Allen, he and Rubenstein took certain investments and Petitioner (Joint Appendix Tr 129, 130):

> "A. Well, I think Mr. Butcher, when he left, took with him all of his real estate clients as a lawyer, and took them with him, and also took with him the partnerships that he was – which were law clients, as well as things he was involved with as a syndicator, as you use it.
>
> Q. Okay. And this was part of the dissolution of the law business, is that correct?
>
> A. Well, Mr. Butcher had been the real estate principal in the professional corporation. He had – they were his clients, basically. I mean, he had – he developed them and had them and took them with him, including amounts that were owed to the firm by those clients, if there were amounts owed and so forth, yes."

Rubenstein and Allen both disclaimed any interest in any of the investments assigned to Petitioner, except their claims made in connection with the FWALP investment, even though they remained as limited partners in other investments.

The Government's apparent theory as to the 1986 distribution was that Petitioner devised and executed a successful scheme to obtain, and thereafter wrongfully convert, the funds representing the 1986 distribution, in violation of 18 USC § 1341 (Counts I and II), after which he transported those funds via a wire transfer in the amount of $125,000 (Count V) and by the mailing of a $25,000 personal check (Count VI) from the State of Michigan to the State of New York, where the funds were converted by Petitioner when he

paid them to his creditor in New York to satisfy a personal obligation. App. 3. The entire $150,000 was alleged to have been converted and obtained by fraud even though the Government claimed Rubenstein and Allen were entitled only to one-third of $139,850 ($46,617 apiece).

The Sixth Circuit Court of Appeals affirmed Petitioner's convictions on Counts V and VI, relating to the 1986 distribution, holding "no error resulted from Butcher's conviction for **wrongfully converting** those funds." App. 5.

The Government's theory as to the $19,105.52 distribution made to the RBA entity in 1987 was obtained by Petitioner in furtherance of a scheme to defraud because (Count III) he mailed directions to Alfred E. Klein, the distributing general partner of FWALP, on or about July 6, 1987, in response to a letter of inquiry by Mr. Klein, dated June 3, 1987, to mail the check to him assuring Mr. Klein Petitioner would "take responsibility for the proper disbursement of the distributions to the RBA partnership" App. 44; and, Count IV alleges that the mailing of the $19,105.52 check **by Mr. Klein** from Florida to Petitioner was "caused" by Petitioner, and therefore violated § 1341. The same July 10, 1987, mailing of the $19,105.52 check by Mr. Klein, from Florida, to Petitioner, is claimed to be a violation **by Petitioner** both of § 1341 mail fraud (Count IV) and § 2314 interstate transportation (Count VII).

The Government has claimed throughout each RBA partner was entitled to one-third of the two distributions from FWALP to RBA in 1986 and 1987, which were received by Petitioner as the sole general partner of RBA. The words "Upon sale or dissolution of any of the investments each partner was entitled to a return of capital and one-third of any of the profits." contained in paragraph 2 of the indictment, are simply the drafter's interpretation of the RBA limited partnership certificate. (Exhibit 9).

Petitioner filed a Motion to Dismiss before trial, which was denied, App. 7; and he brought a Rule 29 Motion for Judgment of Acquittal after the Government rested and after the trial, which was denied, App. 9. The Sixth Circuit

affirmed Petitioner's convictions on Counts III – VI, inclusive, but reversed and dismissed his conviction under Count VII for lack of evidence. App. 5.

Petitioner has maintained throughout that neither Rubenstein nor Allen were entitled to any share of the distributions from FWALP to RBA. He gave Rubenstein and Allen $25,000 in 1986, App. 3, on Allen's pleas of financial difficulties with a prior partnership investment taken over by Rubenstein and Allen. Neither Rubenstein nor Allen questioned Petitioner's statement that he had previously paid to them approximately $5,000 for which he has received no credit or repayment.

Petitioner asserted from the outset that the indictment was based upon false allegations of fact, principally its claims that the FWALP interest was purchased by RBA in July of 1972, paragraph 3, and that the funds in question were the funds of the RBA limited partners, paragraph 6. RBA Investments limited partnership was formed in 1974 and thus could not have purchased an interest and become a limited partner in FWALP in 1972. Both paragraphs 2 and 3 of the indictment are false in their entirety. The FWALP distributions paid to RBA were not "the funds of the limited partners". The Court of Appeals held that, instead of being the owners of the funds, they had "an interest therein". App. 5. Michigan Circuit Judge Hilda Gage, in a prior civil action, held that the funds in question belonged to the partnership, not the individual partners. App. 46. Government Exhibit 9, the RBA Investments limited partnership certificate, establishes the formation date of October 31, 1974 for RBA.

Petitioner has also argued throughout that the allegations of the indictment do not set forth federal offenses under §§ 1341 and 2314, because the only person in the world authorized to receive the FWALP distributions, under the Government's theory, was Petitioner. There could be no wrongful obtaining and no necessity for scheming and/or misrepresentations by Petitioner. He was specifically authorized by the limited partners to receive such funds. If he had converted the funds after receipt, as claimed in paragraph 6, within the State of Michigan, he could not thereafter transport

those funds in interstate commerce because the act claimed to constitute the conversion of the 1986 distribution was the payment to a personal creditor; if Petitioner disposed of the funds by paying his creditor in Michigan, he could not thereafter transport them in interstate commerce. If he transported the funds in interstate commerce while they were lawfully in his possession, and then converted them in another state by paying his creditor, he had not transported such funds "knowing them to be stolen, converted or obtained by fraud". If he simply refused to pay partnership funds to the limited partners, without converting such funds to his own use, there should be no basis for either a § 1341 charge or a § 2314 charge.

Petitioner has been literally convicted of converting the funds of RBA limited partnership on a claim that he did not distribute partnership funds **in accordance with the distribution requirements of the limited partnership certificate.** The Government now concedes that the limited partnership was not in existence in July of 1972 and did not purchase an interest in FWALP that month and year. Its own Exhibit 9 establishes the formation date of the limited partnership as sometime in 1974. The Sixth Circuit concedes, App. 2, that the allegations of paragraph 3 of the indictment are false. The Government and the Sixth Circuit concede that there is no charge in the indictment or any documentary evidence which would establish that the FWALP interest obtained by the co-partnership was ever transferred to the limited partnership.

RBA Investments **co-partnership** appeared as the owner of the FWALP interest on the dates of the 1986 and 1987 distributions. Exhibit K. Petitioner argued that, since RBA Investments limited partnership was never proved to be the owner of any interest in FWALP, Petitioner's actions could not under any circumstances violate the distribution provisions of the limited partnership agreement.

The Government has drafted and prosecuted an indictment based upon false factual claims, knowing at all pertinent times that its claims were basically false. Its own Exhibit 9 establishes that RBA Investments limited partnership was formed in 1974. There were **three** interests in FWALP

acquired in July of 1972, not simply "an interest" as set forth in paragraph 3 of the indictment. Petitioner acquired an interest as a general partner in FWALP, for which he gave separate consideration. RBA co-partnership acquired a Class A-1 limited partnership interest in FWALP, for which it paid $33,000, each RBA partner contributing $11,000 to such purchase. RBA co-partnership also acquired a Class D limited partnership in FWALP, which was awarded to Petitioner for taking on the responsibilities of a general partner of FWALP. Neither Rubenstein nor Allen made any contribution to, or were entitled to any distribution from, the FWALP general partnership interest or the Class D limited partnership interest.

The Government was well aware of the fact that the distribution rights of the RBA partners under three different FWALP partnership interests were involved. Government Exhibit 5 sets forth the anticipated distributions to the various classes of FWALP partners. Even though the $1,150 check, forming the basis for Count II, was sent to him as a distribution arising out of his general partnership interest in FWALP, Petitioner was charged with mail fraud, in receiving this check, and was charged with interstate transportation of these funds asserted to be obtained by fraud and/or converted (Counts V and VI). Even though the 19 other Class A-1 limited partners received $39,155.55 in the two distributions, in return for their $33,000 original partnership contributions, Petitioner was convicted because the government insisted and the Court of Appeals has found that RBA was entitled to receive $158,955 as a return on its $33,000 investment.[1] At most, the partners were each entitled to one-third of $39,155.55, not one-third of $158,955. They each admittedly received some $15,000 from Petitioner.

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[1] Of the total distributions from FWALP, $39,155.55 was paid to the RBA entity as a Class A-1 limited partner, and $119,799.97 was paid to RBA as a Class D limited partner. Tr. Exh. 5, App. 48.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

I. 18 USC § 2314 (INTERSTATE TRANSPORTATION OF STOLEN PROPERTY) HAS NOT BEEN VIOLATED WHERE THE COURT OF APPEALS FOUND THAT THE ALLEGED CONVERSION BY PETITIONER OCCURRED AFTER THE CONCLUSION OF THE INTERSTATE TRANSPORTATION

Counts I, II, V and VI of the indictment relate to the 1986 distribution made by FWALP to RBA Investments. Counts I and II charge mail fraud violations as to the 1986 distribution under 18 USC § 1341. Counts V and VI charge subsequent interstate transportation of the funds by Petitioner "knowing the same to have been converted ***and*** taken by fraud" in violation of § 2314. It is not claimed that the funds were "stolen".

It must be kept in mind that Petitioner **was acquitted by the jury of the charges contained in both Counts I and II.** Thus, the mail fraud convictions under Counts I and II anticipated by the Government in charging illegal interstate transportation did not occur and the jury's acquittals on these counts expressly refute the charges contained in Counts V and VI, as to such 1986 distribution, either that the funds were wrongfully obtained or that they were converted by Petitioner.

The pertinent portion of 18 USC § 2314, under which Petitioner was charged in Counts V, VI and VII provides:

> "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, **knowing the same to have been stolen, converted or taken by fraud;**" (emphasis supplied).

The Court of Appeals, citing this Court's decision in *Dowling* v *United States*, 473 U.S. 207, 214 (1985), acknowledged that one of the elements of the offenses charged in Counts V, VI and VII was "that the defendant knew the money had been stolen, converted or taken by fraud." It expressly reversed and dismissed Petitioner's conviction under Count VII, as to the 1987 distribution, because "there appears to be

insufficient evidence to have established that the $19,105.52 was stolen at the time it was transported from Florida to Michigan." App. 5.

The Court of Appeals refused to reverse Petitioner's § 2314 convictions under Counts V and VI. It held that Petitioner was convicted "for wrongfully converting those funds.", App. 5, and that Petitioner "used the full amount [of the 1986 distribution to RBA] to satisfy a personal debt." App. 3. What the Court of Appeals failed to point out is that the payment by Petitioner "to satisfy a personal debt" was a payment made by him to his creditor in the State of New York after the conclusion of the interstate transportation.

Petitioner suggests that his convictions under Counts V and VI should have been reversed and dismissed by the Court of Appeals for these reasons:

1. The express wording of § 2314 prohibits the interstate transportation of moneys which have been stolen, converted or taken by fraud prior to the interstate transportation. The conversion found by the Sixth Circuit, the payment of Petitioner's creditor, occurred in the State of New York and after the conclusion of the interstate transportation of the funds.

2. No reported case holds that § 2314 can be violated where the interstate transportation occurs prior to the theft, conversion or fraudulent taking. The following cases, and more, specifically hold that the theft, conversion or fraudulent taking must occur prior to the interstate transportation:

Loman v *U.S.*, 243 F.2d 327 (1957);

U.S. v *Poole*, 557 F.2d 531 (1977); and,

Dowling v *United States*, supra.

3. The Court of Appeals, which cited *Dowling* v *United States*, in affirming Petitioner's convictions on Counts V and VI, appears to have misread *Dowling*. This Court stated in *Dowling*, 473 U.S. at p 216:

"But these cases and others prosecuted under § 2314 have always involved physical 'goods,

> wares, [or] merchandise' that have themselves been 'stolen, converted or taken by fraud.' This basic element comports with the common-sense meaning of the statutory language: by requiring that the 'goods, wares, [or] merchandise' be 'the same' as those 'stolen, converted or taken by fraud,' the provision seems clearly to contemplate a physical identity between the items unlawfully obtained and those eventually transported, **and hence some prior physical taking of the subject goods.**" (Emphasis supplied).
>
> The payment to Petitioner's creditor, relied upon by the Sixth Circuit to affirm Petitioner's § 2314 convictions, unquestionably occurred in the State of New York after completion of the interstate transportation.

4. The Sixth Circuit was inconsistent in its application of § 2314 to Counts V, VI and VII. It made no finding that the 1986 distribution was stolen, converted or obtained by fraud prior to its interstate transportation. It should have also reversed and dismissed the convictions under Counts V and VI. Note that had Petitioner paid his creditor with the funds in question in the State of Michigan he could not possibly thereafter transport the funds in interstate commerce because the funds would then have been in the possession of his creditor.

18 USC § 2314 is not violated where the alleged conversion occurs after the completion of the interstate transportation of the subject property.

II. RECEIPT OF DISTRIBUTIONS DUE TO A LIMITED PARTNERSHIP BY THE SOLE GENERAL PARTNER OF SAID LIMITED PARTNERSHIP, WHO THEREAFTER FAILS TO REMIT ANY PORTION THEREOF TO THE LIMITED PARTNERS, IS NOT A VIOLATION OF THE MAIL FRAUD PROVISIONS OF 18 USC § 1341

Petitioner was convicted under Counts III and IV of the indictment, which charged violations of § 1341 by him, as to the 1987 distribution to RBA in the amount of $19,105.52.

18 USC § 1341 provides in pertinent part:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, . . . or knowingly causes to be delivered by mail according to the direction thereon, . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

The only interstate transportation of these funds occurred in 1987 when the distributing FWALP general partner mailed the $19,105.52 check from his new residence in Florida, to Petitioner in Michigan. The Sixth Circuit reversed Petitioner's conviction and dismissed Count VII holding that there was insufficient evidence to support the § 2314 charge relating to the interstate transportation of this money, because there was no evidence to show that such funds were stolen when mailed by the distributing partner. App. 5.

Under the Government's theory, Petitioner was entitled to retain $6,368.51, one-third of this $19,105.52. If Rubenstein and Allen were not entitled to share in the Class D distributions, their shares of the 1987 distribution would have been $335.18 apiece, one-third of the Class A-1 distribution of $1,005.53. Exhibit 5, App. 48.

On July 6, 1987, Petitioner, in response to inquiries by Mr. Klein as to where to send the 1987 RBA distribution, stated App. 44, in a letter mailed to Mr. Klein:

> "This will confirm our telephone conversation last week covering the following:
>
> 1. I will take responsibility for the proper disbursement of the distributions to the RBA partnership of funds from the Flint-Woodcrest Apartments per the allocation schedule of April 24 which you mailed to me with your letter of June 3, 1987. Please send the checks to RBA as

> a Class D Limited Partner ($18,099.97) and as a Class A-1 Limited Partner ($1,005.55) care of me at 1231 U.S. 31 North, Petoskey, MI 49770."

Petitioner has been convicted in Count III on this use of the mails because he represented that he would take responsibility for the proper disbursement of the 1987 distributions **"to the RBA partnership"**, which he did. There was no mention of either the RBA limited partnership or of the limited partners in the letter. There was no misrepresentation.

Petitioner was convicted of the mail fraud charge made in Count IV because he received the check for $19,105.52 mailed by Mr. Klein, on behalf of the RBA partnership in response to his July 6, 1987 letter. Petitioner did not "cause" this mailing. Mr. Klein sent distributions to each of the FWALP partners in the same mailing.

Neither the Government nor either lower court has pointed to or relied upon any decision by any federal court which has held that receipt of partnership funds by a general partner of a limited partnership can in any way violate § 1341. Petitioner, as the sole general partner, was literally the only person in the world entitled to receive such money under the Government's theory. While a limited partner could well be deemed not to have the authority to receive proceeds due to a limited partnership, there is no conceivable basis for any claim that the sole general partner of a limited partnership does not have the authority to receive partnership funds, particularly where, as here, the government admits that under its theory Petitioner was entitled to at least one-third of the funds.

There was no violation of 18 USC § 1341 in this case because:

> 1. The indictment does not claim that either the 1986 or 1987 distribution was wrongfully **obtained** by Petitioner. Rather, paragraph 5, it specifically states that Petitioner "owed a duty to the limited partners to distribute the proceeds received from the distribution according to the interest of each limited partner."

2. As the sole general partner of RBA, Petitioner had no need to scheme to obtain the distributions to RBA.

3. The funds were partnership funds. The district judge, in denying Petitioner's Rule 29 Motion for Acquittal, erred in holding that the moneys belonged to the limited partners. App. 12. MCLA 449.8(1) and (2) provide:

> "Sec. 8. (Partnership Property).
>
> (1) All property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership is **partnership property;**
>
> (2) Unless the contrary intention appears, property acquired with partnership funds is **partnership property**;" (Emphasis supplied).

MCLA 449.1606 provides:

> "Sec. 606. At the time a partner becomes entitled to receive a distribution, the partner has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution."

The holding of *People* v *Zinke*, Slip Copy 1990 WL 55794 (N.Y.), accords with Michigan law, that a partner cannot be convicted of larceny for misappropriating partnership assets. The district Judge agreed with the holding in *Zinke*. He erred in holding that the money "belonged" to Rubenstein and Allen, and not to the partnership.

4. The Sixth Circuit panel made no finding either that Petitioner had in any way wrongfully obtained the funds in question, or that the funds belonged to Rubenstein and Allen. Under Michigan law, that interest is at most the interest of a creditor. It specifically found that they had "an interest in" the funds.

5. Petitioner did not transport any part of the $19,105.52 in interstate transportation after receiving same; he did not use the money to pay any

creditor of his within or without the State of Michigan; he simply refused to pay the limited partners anything out of the 1987 distribution.

Petitioner has never been charged with conversion, embezzlement, or theft, but the district court has found him guilty of **stealing,** App. 12, the funds in question and the Sixth circuit panel has found that he was convicted of wrongfully **converting** the funds in question. App. 5. The claimed conversion of property lawfully acquired by a person, and occurring after its lawful acquisition, does not violate the provisions of 18 USC § 1341.

III. PETITIONER'S ACQUITTALS UNDER COUNTS I AND II OF THE INDICTMENT CONSTITUTE ACQUITTALS OR IMPLIED ACQUITTALS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS TO THE REMAINING COUNTS, BECAUSE THE CONDUCT ALLEGED IN SUCH COUNTS IS INCLUDED IN EACH OF THE OTHER COUNTS AND PROOF THEREOF IS NECESSARY TO ESTABLISH AN ESSENTIAL ELEMENT OF THE OFFENSES CHARGED IN THE SUBSEQUENT COUNTS

Last year, this court decided the case of *Grady* v *Corbin,* 110 S.Ct. 2084 (1990). In *Grady,* this Court held that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." **Id.** at 2093. Petitioner is not aware that the double jeopardy issue raised herein has been submitted to or reviewed by this Court since its decision in *Grady.*

Petitioner reasoned, and argued below, that the conduct charged in Counts I and II of the indictment to constitute offenses under 18 USC § 1341 were included and attempted to be proved in each subsequent numbered count. This was so because the indictment included the same facts into each

count; it charged Petitioner with **the same** mail fraud scheme in Counts I-IV, inclusive, extending over a period of approximately three years; it alleged various specific mailings as in furtherance of the single scheme; the acts charged in Counts I and II occurred prior to the acts detailed in subsequent counts; and, the indictment necessarily alleged the successful execution of the single scheme in that the funds allegedly sought to be obtained by Petitioner, through mail fraud, were the same funds alleged to have been subsequently transported or caused to be transported by Petitioner in interstate commerce in violation of 18 USC § 2314.

Petitioner reasoned, and argued below, this sequence of propositions: The conduct of which Petitioner was charged in Counts I and II and subsequently acquitted was included (the same scheme to defraud by use of U.S. mails) in both the charges and proofs comprising Counts III-VII, inclusive; Petitioner's acquittals under Counts I and II terminated his prosecutions under those two counts, under this Court's holding in *Green* v *U.S.*, 355 U.S. 184, 78 S.Ct. 221 (1957); any further proceeding under Counts III-VII, inclusive, constituted a proceeding subsequent to the termination of Petitioner's jeopardy under Counts I and II and, therefore, was barred by the specific holding of this Court in *Grady*.

In rejecting Petitioner's double jeopardy argument, the Sixth Circuit panel relied upon *United States* v *Sammons*, 918 F.2d 592, 604-05 n.21 (6th Cir. 1990), and held that *Grady* "does not extend to alleged violations contained within one indictment." App. 5. The difficulty with the *Sammons* decision is that defendant was convicted on all charges brought in the multiple count prosecution. *Sammons* has no force or application to the argument raised by Petitioner.[2]

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[2] Petitioner does not disagree with the Sixth Circuit analysis where a defendant is convicted on all charges in a multiple-count prosecution. A conviction does not terminate the prosecution in a multiple-count proceeding. Under *Grady*, an acquittal under a charge based on facts occurring later in time would not act as a bar to conviction on charges based on facts occurring prior in time, even where the charges are brought in one prosecution.

The Government has not claimed, and the Sixth Circuit Court of Appeals has not held, that Petitioner's conducts charged in Counts I and II were not essential parts of the Government's charges and proofs in Counts III-VII, inclusive. The issue presented appears to be whether the taking of **any** action by the district court, based upon conduct charged in Counts I or II, which could or did result in subsequent convictions, after receiving Petitioner's acquittals on Counts I and II, constituted a subsequent prosecution or subsequent prosecutions of Petitioner.

Petitioner reads the words "subsequent prosecution", as used by this court in *Grady*, to mean what they literally say. When the acquittals were returned on Counts I and II, Petitioner's prosecutions under those counts literally terminated, under this Court's holding in *Green* v *U.S.* Any subsequent action by the Government or the courts under which Petitioner could be deprived of liberty or property based on the same conduct, as in this case, would put Petitioner in jeopardy of life or limb for the same offense a second time.

In *Price* v *Georgia*, 90 S.Ct. 1757, 1761 (1970), this Court stated:

> "The rationale of the *Green* holding applies here. The concept of continuing jeopardy implicit in the *Ball* case would allow petitioner's retrial for voluntary manslaughter after his first conviction for that offense had been reversed. But, as the *Kepner* and *Green* cases illustrate, **this Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is express or implied by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge.**" (Emphasis supplied).

Earlier, in *Price* v *Georgia*, at p 1759 of 90 S.Ct., this Court stated:

> "In *United States* v *Ball*, 163 U.S. 662, 669, 16 S.Ct. 1192, 1194, 41 L.Ed. 300 (1896), this Court observed: 'The Constitution of the United States, in

> the Fifth Amendment, declares, "nor shall any person be subject [for the same offense] to be twice put in jeopardy of life or limb." The prohibition is not against being twice punished, but against being twice **put** in jeopardy * * * .' (Emphasis added.) The 'twice put in jeopardy' language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be **convicted** of the 'same offense' for which he was initially tried."

The Sixth Circuit panel apparently reads the words "subsequent prosecution", as used by this Court in *Grady*, to mean a prosecution instituted either after the date the prosecution in which the double jeopardy claim is raised was instituted, or, one which was instituted after the date that jeopardy under a prior prosecution is terminated in its entirety. In other words, the double jeopardy claim cannot be raised, under the Sixth Circuit's interpretation of *Grady*, based upon any termination of jeopardy on individual counts occurring in the multiple-count prosecution.

In *Justices of Boston Municipal Court* v *Lydon*, 104 S.Ct. 1805, 1812 (1984) this Court stated:

> "The Double Jeopardy Clause of the Fifth Amendment provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.' . . .
>
> Our cases have recognized three separate guarantees embodied in the Double Jeopardy Clause: It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense."

In *Lydon*, at 104 S.Ct. 1813, this Court, citing *Price* v *Georgia*, 398 U.S. 323, 90 S.Ct. 1757 (1970) stated:

> "Acquittals, unlike convictions, terminate the initial jeopardy. This is so whether they are 'express or implied by a conviction on a lesser included offense.' "

Petitioner suggests, and has argued, that his acquittals under Counts I and II of the indictment, which acts and proofs

were included within every subsequent count of the indictment, constituted acquittals or implied acquittals on the subsequent counts contained within the indictment which protects him against a second prosecution whether Counts I and II are deemed to be the same offense as, a species of included offense, or an offense included in, each of the other five counts.

The Constitution contains no provision limiting the application of the Fifth Amendment's protection "against a second prosecution for the same offense after acquittal" to single count prosecutions. The Double Jeopardy Clause protections cannot be avoided by the Government by the filing of multiple count indictments. The Government cannot bring the same charge twice in the same prosecution, *Sanabria* v *United States*, 98 S.Ct. 2170 (1978); and, it cannot convict a person twice of the same offense, where more than one offense is included within the greater charge, whether the first conviction is on the greater charge, *Harris* v *Oklahoma*, 97 S.Ct. 2912 (1977), or on the lesser included charge, *Brown* v *Ohio*, 97 S.Ct. 2221 (1977).

This Court, in *Price* v *Georgia*, supra, p 1761 of 90 S.Ct., in discussing the Double Jeopardy Clause protection "against a second prosecution for the same offense after conviction,", refers to the implied acquittal necessary to implement the Fifth Amendment where there are convictions on both the greater and lesser included offenses. No reason is suggested by the Sixth Circuit Court of Appeals why this Court, in enforcing the Double Jeopardy Clause, should not apply the concept of implied acquittals in the factual situation where a citizen claims the protection of the Fifth Amendment to bar a second "risk" that he be convicted for the same offense, after acquittal. A person's express acquittal for the same offense, whether charged in the same prosecution or proceeding, or in separate proceedings, is of itself and as a matter of constitutional law an express or implied acquittal of all other charges for the same offense, whether such other charges are formally pending, making any further action on the charges acquitted by law, subsequent prosecutions.

The holding of the Sixth Circuit that there must be some time interval and some new procedural activity by the Government after the return of an acquittal in order for a defendant to claim the protection of the Double Jeopardy Clause is at odds with the Constitution and this Court's decisions. The implied acquittals, as to other charges for the same offense, arise as a matter of constitutional law immediately upon the first termination of jeopardy on one charge for the same offense, whether such termination is the result of acquittal or conviction.

IV. PETITIONER WAS DENIED HIS RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THE PROSECUTION OF THIS ACTION IN THAT HE WAS CONVICTED OF CHARGES NOT CONTAINED IN THE INDICTMENT AND HE WAS CONVICTED ON ALLEGATIONS OF FACT CONTAINED IN THE INDICTMENT ADMITTED BY THE GOVERNMENT AND FOUND BY THE LOWER COURTS TO BE UNTRUE

There are two basic flaws in the indictment returned against Petitioner:

1. It charges a scheme by Petitioner to convert from the RBA limited partners moneys which were not theirs and which only he, as the RBA sole general partner, was entitled to receive.

2. It contains allegations of relevant facts, conceded by the Government and the lower courts as being false.

As to #1, the indictment makes no claim that receipt of the distribution checks by Petitioner was in any way wrongful. If he could not lawfully receive those checks, then certainly neither limited partner could lawfully receive them. Rather, the indictment charges, paragraph 5, that Petitioner "owed a duty to the limited partners to distribute the proceeds received from the dissolution according to the interest of each

limited partner." and that, upon receipt of the RBA Investments' funds . . . Petitioner "converted the funds of the limited partners to his own use." para 6. Clearly, the indictment sets forth the authorized receipt of the funds in question by Petitioner and alleges the subsequent conversion, after lawful receipt by him, of those funds claimed to be the "funds of the limited partners", but which were not their funds.

The Court of Appeals certainly understood that the gist of the mail fraud charges was an allegedly wrongful conversion of funds lawfully received by Petitioner, for it stated, App. 5, "No error resulted from Butcher's conviction for wrongfully converting those funds."

Thus, Petitioner has been convicted of converting monies paid to RBA, under 18 USC § 1341, which is a statute which prohibits the use of the United States mails in a scheme designed to wrongfully **obtain** funds or other property. Conversion is not an element of 18 USC § 1341. App. 4. Petitioner has never been charged with the offense of conversion.

As to #2, the true facts, which neither the Government nor the lower courts now question, as established by the evidence introduced at trial showed:

> 1. The FWALP interests were acquired by RBA **co-partnership** (Exhs K, L) and by Petitioner, not by RBA Investments limited partnership.[3]
>
> 2. There was never any assignment of the FWALP interests from the RBA co-partnership to the RBA limited partnership. On the dates of the distributions referred to in the indictment, in 1986 and 1987, the co-partnership was listed as the owner of the FWALP interest in question (Exh K).
>
> 3. There was never any written assignment of the co-partnership's interest in FWALP, as required by Michigan law, MCLA 449.1202; MSA 20.1202, and by the FWALP partnership certificate (Exh K)

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[3] Government exhibits were numbered; defense exhibits were lettered.

to effect transfer of title. The statute expressly provides that a limited partnership's certificate **"is amended by filing a certificate of amendment" (within 60 days) with the public authority.** The amended partnership agreement (Exh K) requires a written assignment, consented to by the general partners. Para X. There was no assignment and no amendment of the FWALP certificate, as the panel recognized.

4. Alan G. Thomson, the FWALP accountant, was of the opinion at the time the distributions were made by FWALP that the owner of the FWALP interest was the co-partnership, rather than the limited partnership.

5. Government Exhibit 9 indicates that the only capital contribution made to the limited partnership by its partners were the sums of $200 paid by each. There is no claim in the testimony or documentary evidence to the effect that RBA Investments limited partnership ever acquired the FWALP interest or became a limited partner in that limited partnership, either in the manner charged in paragraph 3 of the indictment or at any time after the limited partnership was formed in 1974. The panel and the government concede that title was in the co-partnership, not the limited partnership.

6. The RBA Investments funds received by Petitioner were not at any time the "funds of the limited partners" of RBA. Conceding the point, the Sixth Circuit Court of Appeals held that the "RBA limited partners had an interest in the Flint-Woodcrest proceeds paid to RBA." App. 5. It made no finding that the funds allegedly converted were the funds of the RBA limited partners.

The Sixth Circuit panel, App. 2, agreed with Petitioner's argument that the limited partnership never acquired the FWALP interest in the manner alleged in paragraph 3

because, of course, the limited partnership was not in existence in July of 1972. The panel accepted Petitioner's claim that the FWALP interest was in fact acquired by the co-partnership, rather than the limited partnership. It conceded that the limited partners were not the owners of the funds under any theory.

The panel then, App. 2, appeared to attempt to "resolve" the ownership or title question by stating:

> "RBA was later converted to a limited partnership with Butcher as the sole general partner; however, Rubenstein and Allen retained their one-third interest in RBA."

The difficulties with this approach to the problem are that:

1. There is no provision under Michigan law for "converting" a co-partnership into a limited partnership.

2. Both the Government exhibits (Exh 9) and Petitioner's exhibits (Exhs K, L) conclusively show that there was never any transfer of the FWALP interests from the co-partnership to the limited partnership. The co-partnership was the listed owner on the FWALP books (Exh K).

3. Petitioner was not charged with violating the distribution rights of the co-partners under the co-partnership agreement.

4. There is no claim by the Government in the indictment to the effect that the limited partnership was in effect the same entity as the general partnership, nor was there any claim in the indictment that the partners in the limited partnership "retained their one-third interest in RBA." There was no evidence whatever regarding the interest held by the partners in the co-partnership or their rights to share in any FWALP distributions. The Government's Exhibit 9 indicates a **separate contribution** to the limited partnership of $200 by each partner, when it was formed, but the FWALP interest was never transferred to the limited partnership.

Petitioner's point is simply that if the limited partnership was not the original purchaser or owner of the FWALP interests, its limited partners were not the owners of the funds or any interest therein, and Petitioner cannot be guilty either of wrongfully obtaining limited partnership property or of violating the ***limited partnership*** distribution agreement. Petitioner was convicted of an offense not charged in the indictment. The co-partnership agreement did not contemplate an equal distribution to all co-partners.

When the Sixth Circuit panel (properly) concluded that the RBA limited partnership never acquired title to the property in question as claimed in paragraph 3 of the indictment, it should have reversed the convictions entered in the district court, leaving open the possibility that the Government could refile claiming federal violations as to funds owned by the general partnership and/or its partners. The Sixth Circuit erred because it affirmed Defendant's convictions on the claims contained in paragraphs 2 and 3 of the indictment, even after it found that the limited partnership was never the owner of the FWALP interests. The Sixth Circuit affirmed, App. 2, on its **assumption** that each partner of **the co-partnership** "contributed approximately $11,000 to the partnership in exchange for a one-third partnership interest.", which is a charge not contained in the indictment; which is demonstrably false. Rubenstein and Allen made a contribution to each acquire a one-third share in the Class A-1 interest only.

The Government's basic premise in this entire matter, apparently adopted by the Sixth Circuit panel, is absurd. In July of 1972, Petitioner (who was not previously a partner in FWALP) resyndicated FWALP by bringing in 20 investors, each of whom contributed $33,000 and who received in return one Class A-1 limited partnership interest in FWALP. The total new money invested in FWALP was $660,000. One of the 20 new Class A-1 investors was RBA co-partnership.

The 19 other Class A-1 FWALP limited partners who invested in the resyndication handled by Petitioner in 1972, each received back in 1986 and 1987 a total return of

$39,155.55, as a return on their respective $33,000 investments. The Government claims, para 4 of the indictment, that RBA, alone out of the 20 FWALP Class A-1 limited partners, was entitled to receive back the sum of $158,955.52, rather than $39,155.55, as a return on the $33,000 investment made by RBA co-partnership, and the Sixth Circuit panel apparently agreed.

The fact of the matter is that RBA (whether the co-partnership or the limited partnership) received back as a return on its $33,000 investment the sum of $39,155.55, exactly the same as the other 19 Class A-1 investors received. (Exh 5). In addition, the checks to RBA included the amount of $119,799.97 which was paid to RBA as a Class D partner in FWALP. (Exhs 5, K, L). Petitioner's co-partners, Rubenstein and Allen, made no contribution whatever to the acquisition of the FWALP Class D limited partnership interest. This interest was negotiated by Petitioner as a reward to him for assuming the status of a general partner in FWALP, thus becoming personally liable for its obligations. This personal liability on this failing enterprise assumed by Petitioner continued for more than 15 years, until FWALP was dissolved in 1987.

There is no claim by the Government in the indictment, or by the Court of Appeals, that either Rubenstein or Allen made any contribution whatever to the FWALP Class D limited partnership interest put in RBA's name. There was no claim that there was ever any agreement among the partners in the co-partnership that Rubenstein and Allen would share in any proceeds distributed to RBA as a Class D partner in FWALP. Rubenstein and Allen made no Class D investment; there was no non-monetary consideration running from them to FWALP in the transaction. There is no claim by the Government, and no finding by the Court of Appeals, that the distribution arrangements under the co-partnership were ever changed. Indeed, the panel says that "Rubenstein and Allen **retained** their one-third interest in RBA." (emphasis supplied). If they "retained" their respective co-partnership interests, the Government should have pleaded and proved the extent of those interests.

Assuming Rubenstein and Allen were entitled to the same proportionate return received by all of the 20 FWALP new investors in the 1972 resyndication, they would have each been entitled, by virtue of their respective $11,000 investments, to a return of $13,051.85. They admittedly received $25,000, App. 3, which they divided among themselves; the testimony indicates that they have received several thousand dollars in other money from Petitioner for which they have not accounted to him, or given him credit against their RBA claims.

Neither the Government, nor the Court of Appeals in affirming the convictions, offer or attempt to offer any explanation as to why these attorneys should receive $158,955.52 as a return on their $33,000 cash investment when 19 of their clients, who also invested $33,000, in the same transaction, received back only $39,155.55 (Exh 5). App. 48.

The offenses charged in the indictment have not been proved because all evidence shows that the co-partnership was still the owner of the FWALP interest, and it is the partners' distributions rights under the co-partnership agreement which control, not the provisions of the limited partnership certificate. Defendant was convicted on charges not contained in the indictment.

Obviously, Petitioner could not be guilty of scheming to obtain limited partnership funds and/or converting the funds of the limited partners if the limited partnership was never the owner of the funds in question. Petitioner testified that there was a change in the distribution rights of the partners, and the Rubenstein and Allen assigned all FWALP income to him, subsequent to the breakup of the professional corporation. Rubenstein and Allen denied this and the Court of Appeals held they "retained" their interest in the co-partnership.

Under these findings, the Government would have to establish the distribution rights of each co-partner under the co-partnership agreement, even if RBA limited partnership had acquired the FWALP interests. This it has not done or charged.

Petitioner was denied the due process of law guaranteed him under the Fifth Amendment, and his rights under the Sixth Amendment to the U.S. Constitution in that:

1. He has been convicted of conversion, but has never been charged with conversion, contrary to the requirements of the Fifth Amendment. Conversion is not a federal offense.

2. In effect, he has been compelled to be a witness against himself in these proceedings because the court denied his Motion to Dismiss in which he pointed out that RBA Investments limited partnership was not in existence in 1972, as alleged in para 3 of the indictment. All exhibits relating to the RBA co-partnership were introduced by Petitioner. He was forced to give testimony regarding the content and effect of those exhibits, the effect of which was to change the burden of proof from the Government to Petitioner. The Government made no attempt to explain why Rubenstein and Allen were entitled to a return of $52,985.17 each on their $11,000 investments when the other FWALP A-1 partners received $13,051.85. The burden of proof was shifted.

Even though Petitioner prevailed on his defenses that the limited partnership did not purchase the FWALP interest; that the co-partnership did purchase the FWALP interest; that there was more than one FWALP interest; and, that the $11,000 per partner investment was made in the co-partnership, rather than the limited partnership, and even though he prevailed in his defenses that there was never any assignment of the FWALP interests from the co-partnership to the limited partnership nor was any charged in the indictment, and even though the Government never attempted to establish that Rubenstein and Allen each had a one-third interest in the co-partnership, the Sixth Circuit Court of Appeals affirmed Defendant's conviction

on a charge of converting the funds of the RBA limited partners.

3. Obviously, Petitioner was deprived of his Sixth Amendment right "to be informed of the nature and cause of the accusation", if the Government can make a false claim as to the ownership of the property in question. There is simply no way to prepare for a trial where the Government proceeds on false allegations unless a person is confident that the charges will be dismissed upon exposure of the Government's false claims.

In this connection, this Court has stated in *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 1073 (1970):

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused **against conviction** except upon **proof beyond a reasonable doubt of every fact necessary to constitute the** crime with which he is charged." (Emphasis supplied).

In *Jackson* v *Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 2787 (1979), 61 L.Ed.2d 560, the court stated:

> " . . . In short, *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt **of the existence of every element of the offense.**" (Emphasis supplied).

The Government has not proved its charge that the RBA limited partners owned the funds in question. It now says they "had an interest in the Flint-Woodcrest proceeds paid to RBA." and Petitioner

was convicted of "wrongfully converting those funds.". The Government has not even proved that the limited partnership owned the funds.

4. Petitioner has been convicted (Counts V and VI) of transporting converted funds in interstate commerce even though the jury acquitted him of charges made in Counts I and II that he wrongfully acquired or converted those same funds.

5. Petitioner has been convicted of transporting converted funds in interstate commerce, even though the Sixth Circuit found that the alleged conversion occurred in the State of New York, after the completion of the interstate transportation, App. 3, when he paid his creditor.

6. Petitioner has been convicted of converting funds (Counts III and IV) which he was entitled to receive and hold, without any showing of the nature of the alleged conversion. The 1987 distribution was not transported by Petitioner in interstate commerce and he admittedly paid to limited partners Rubenstein and Allen the sum of $12,500 apiece, from his own funds, more than a year prior to receipt of the 1987 distribution, which was far more than the $6,365.17 the Government claims each limited partner was entitled to from such distribution.

CONCLUSION

The indictment contains a claim of wrongdoing which should not have been prosecuted under federal statutes. The Sixth Circuit Court of Appeals found the essence of the wrongdoing to be the conversion of the RBA funds, after lawful receipt thereof by Petitioner and after the completion of the interstate transportation.

Petitioner was sentenced to 54 months in prison, a sentence far in excess of any which could be justified for either conversion of, or refusal to distribute, two-thirds of the $19,105.52 received in 1987. The sentence of restitution of

$86,637, App. 22, can only refer to the **1986 distribution** on which mail fraud charges Petitioner was acquitted by the jury.

Petitioner is unaware of any Michigan case holding that a partner can be convicted of embezzling or misappropriating partnership assets, under Michigan law. There do not appear to be any decisions to that effect under either 18 USC § 1341 or 18 USC § 2314. Simply put, the funds are never wrongfully appropriated when received by and in the possession of a partner who obviously has the right to possess such funds, particularly where he has an ownership interest in the funds. He cannot steal from himself.

Petitioner was prosecuted and convicted on the wrong claim of entitlement. The finding by the Court of Appeals that Rubenstein and Allen "retained", and thus did not change, their rights in the co-partnership, precludes a conviction for violating the limited partnership agreement. Under this finding, the Government must both charge and prove that Petitioner violated the **co-partner's** rights of distributions, and it must charge and prove what those rights were. No such charges are contained in the indictment. The Government is not allowed to obtain convictions on facts known by it to be false.

The findings by the jury that Petitioner was not guilty of attempting to obtain the 1986 distribution from FWALP in violation of the mail fraud statute were acquittals or implied acquittals on the charges contained in the subsequent five counts, because the acts charged in Counts I and II were included in and required to be proved in the charges contained in the other five counts. Petitioner requests the Court to issue its writ of certiorari.

Respectfully submitted,

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(313) 675-3990

Attorney for Petitioner

APPENDIX

UNITED STATES of America,

Plaintiff-Appellee,

v.

Alexander Michael Butcher,

Defendant-Appellant

No. 90-1745

United States Court of Appeals, Sixth Circuit.

Cause Argued May 10, 1991.
Decided May 23, 1991.

Christopher P. Yates, Asst. U.S. Atty. (argued), Office of the U.S. Atty., Detroit, Mich., for *plaintiff-appellee.*

Robert E. Butcher (argued), Trenton, Mich., for *defendant-appellant.*

Before: KENNEDY and MARTIN, Circuit Judges; and ENGEL, Senior Circuit Judge.

PER CURIAM. Alexander Michael Butcher appeals his conviction on five criminal counts of mail fraud and interstate transportation of stolen money, in violation of 18 U.S.C. §§ 1341 and 2314. Butcher challenges the district court's findings as to the validity of the indictment, the sufficiency of the evidence, and the legality of his multiple convictions. For the following reasons, we affirm in part, and reverse in part.

In 1971, the Flint-Woodcrest Apartments Limited Partnership was formed to acquire and operate an apartment complex in Westland, Michigan known as the Woodcrest Villa Apartments. Butcher was one of the general partners of Flint-Woodcrest. Later that same year, Butcher formed a separate co-partnership with two of his law partners, Erwin Rubenstein and Jerome Allen. The purpose of that partnership, known as RBA, was to invest in the Flint-Woodcrest development. Each partner contributed approximately $11,000 to the partnership in exchange for a one-third partnership interest. The partnership then spent $33,000 to obtain an interest in Flint-Woodcrest. RBA was later converted to a limited partnership with Butcher as the sole general partner; however, Rubenstein and Allen retained their one-third interest in RBA.

In 1974, Flint-Woodcrest sold the Woodcrest Villa Apartments. The sale consisted of a ten-year land contract with most of the proceeds to be collected upon balloon payment of approximately $2,000,000 to be paid at the end of the tenth year. Though some changes were

made in the payment date, Butcher repeatedly reassured Rubenstein and Allen of the anticipated pay-out.

RBA received $139,850 as its first distribution from the sale in February of 1986. Butcher directed Flint-Woodcrest that the money owed to RBA be wired to a bank account of a Butcher enterprise called Michigan North Properties. Butcher then used the full amount to satisfy a personal debt. When Rubenstein and Allen demanded payment, Butcher told them he had been forced to "pledge [their] interest in [Flint-Woodcrest] to another general partner for some loan," but promised payment would be made in the future. Thereafter, Butcher mailed Rubenstein only one check for $5000 and Allen two checks totalling $20,000.

A second distribution was made in June 1987. That check, made payable to the order of RBA associates for $19,105.52, was mailed directly to Butcher and was endorsed "Pay to the order of Harbor Springs Management Co. /s/ R.B.A. Associates." Neither Rubenstein nor Allen received any of the proceeds from the second distribution.

Butcher was subsequently indicted on four counts of mail fraud and three counts of interstate transportation of stolen money. He was convicted of two counts of mail fraud and all three counts of interstate transportation of stolen money. He was sentenced to five concurrent terms of four and one-half years imprisonment, restitution in the amount of $86,637, and special assessments of $250. The district court denied Butcher motions for relief from judgment.

Butcher's first argument is that the indictment fails to allege offenses sufficient to support a conviction for either mail fraud or the interstate transportation of stolen money. On this we disagree. A violation of the mail fraud statute, 18 U.S.C. § 1341, need only contain three elements: "1) a scheme to defraud 2) which involves a use of the mails 3) for the purpose of executing the scheme." *United States v. Henson*, 848 F.2d 1374, 1378 (6th Cir. 1988), *cert denied*, 488 U.S. 1005 (1989). Counts 3 an 4 of the indictment clearly identify two distinct uses of the mails in furtherance of Butcher's scheme to defraud Allen and Rubenstein. Because a challenge to the validity of an indictment will ordinarily fail "as long as the indictment, by fair implication, alleges an offense recognized by law," the district court did not err in finding the indictment sufficient as to the mail fraud count. *United States v. Joseph*, 781 F.2d 549, 554 (6th Cir. 1986).

The same is true for Butcher's claim regarding the interstate transportation of stolen money. Under 18 U.S.C. § 2314 it must be proved: 1) that the defendant has transported money in interstate or foreign commerce, 2) that the money transferred had a value of at least $5000, and 3) that the defendant knew the money had been stolen, converted or taken by fraud. *Dowling v. United States*, 473 U.S. 207, 214 (1985). Butcher's primary claim is that count six of the indictment, which alleges Butcher drew a $25,000 check out of the Michigan North Properties account, fails to satisfy the third prong because that account included funds that had not been stolen, converted or taken by fraud. *See United States v. Poole*, 557 F.2d 531 (5th Cir. 1977). We agree with the district court that commingling of converted funds will not insulate an

individual from prosecution for interstate transportation of stolen money. *United States v. Cardall,* 885 F.2d 656 (10th Cir. 1989).

Butcher's second argument is that there was insufficient evidence to support his conviction. The record includes substantial evidence to support the government's assertion that the RBA limited partners had an interest in the Flint-Woodcrest proceeds paid to RBA. No error resulted from Butcher's conviction from wrongfully converting those funds. However, as to Count VII, there appears to be insufficient evidence to have established that the $19,105.52 was stolen at the time it was transported from Florida to Michigan. Therefore as to this count, we reverse and dismiss.

Butcher's final claim is that his acquittal on counts one and two bars his conviction on the remaining counts as multiple prosecution for the same conduct in violation of the double jeopardy clause as interpreted in *Grady v. Corbin,* 110 S.Ct. 2084 (1990). In *Grady* the court held that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 2093. As critical as the *Grady* analysis is to some cases, it is irrelevant in this case because the protection afforded by *Grady* does not extend to alleged violations contained within one indictment. *United States v. Sammons,* 918 F.2d 592, 604-05 n.21 (6th Cir. 1990).

All other issues raised are without merit. Because of the sentence imposed by the district court in this case, the

dismissal of Count VII does not affect the defendant's sentence. We therefore affirm the district court except insofar as noted.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

ALEXANDER MICHAEL BUTCHER,
Defendant,
_____/

Crim. Action No. 89-80885

HON. BERNARD A. FRIEDMAN

ORDER

This matter having come before the court on defendant's motion for a bill of particulars and motion to dismiss the indictment, a hearing having been held on February 1, 1990, counsel for both parties being present, the court being fully informed in the premises, for the reasons stated on the record,

IT IS HEREBY ORDERED that defendant's motion for a bill of particulars is denied.

IT IS FURTHER ORDERED that the government give defendant access to all documents in its possession relating to this matter; and that it provide defendant access to all investigative reports, except those which are Jencks material. The Jencks material is to be made available prior to trial.

IT IS FURTHER ORDERED defendant's motion to dismiss the indicment [sic] is denied.

/s/ Bernard A. Friedman
BERNARD A. FRIEDMAN
U.S. District Judge

Dated: FEB -7 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

ALEXANDER MICHAEL BUTCHER,
Defendant,
_____/

Crim. Action No. 89-80885

HON. BERNARD A. FRIEDMAN

ORDER

This matter appears before the court on defendant's renewal of his motion for judgment of acquittal pursuant to Federal Rules of Criminal Procedure 29.

Defendant argued his motion for judgment of acquittal on the closing of the government's case and renewed this motion upon the conclusion of the defendant's case.

The court is convinced that the evidence is sufficient to sustain a conviction for the offenses and therefore the motion should be denied.

Accordingly,

IT IS HEREBY ORDERED that defendant's motion filed pursuant to Fed. R. Crim. P. Rule 29 is hereby denied.

/s/ Bernard A. Friedman
BERNARD A. FRIEDMAN
U.S. District Judge

Dated: MAY 17 1990

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Criminal Action No. 89-CR-80885-DT

vs.

HON. BERNARD A. FRIEDMAN

ALEXANDER MICHAEL BUTCHER,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER OF MAY 17, 1990, DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL

This matter is presently before the court on defendant's May 25, 1990, Motion for Reconsideration of the Court's Order Dated May 17, 1990, Denying Defendant's Rule 29 Motion for Judgment of Acquittal. Plaintiff has filed a response to this motion, and defendant has filed a reply. Pursuant to Local Rules 17(l)(2) and 17(m)(2) of the United States District Court for the Eastern District of Michigan, the court shall decide this motion without a hearing.

Local Rule 17(m)(3) states:

> Generally, . . . motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have

> been misled but also show that a different disposition of the case must result from a correction thereof.

In his motion for reconsideration, defendant presents the same arguments which the court has considered, and rejected, on two previous occasions. Defendant argues that he cannot be found guilty of mail fraud or interstate transportation of stolen money because he had an ownership interest in the money at issue in this case. Defendant argues that he cannot steal money from, or defraud, himself.

Defendant raised this very argument in his January 12, 1990, Motion to Dismiss Indictment. The court denied that motion orally on February 1, 1990, and in writing on February 7, 1990. Defendant again raised this argument at trial in an oral motion for judgment of acquittal, and in a written motion filed April 25, 1990. The court denied these motions in an order dated May 17, 1990. Defendant now asks the court to again consider the same argument which the court has, on two previous occasions, considered and rejected. Local Rule 17(m)(3) clearly indicates that such a motion, which "merely present[s] the same issues ruled upon by the court," should not be granted.

Attached to the instant motion is a copy of a recent decision of the New York Court of Appeals, not previously cited by defendant, *People v. Zinke* (May 3, 1990). *Zinke* stands for the proposition that "the general partner in a limited partnership can[not] be found guilty of larceny for misappropriating partnership funds." In *Zinke*, the defendant was a general partner who allegedly stole money "from the partnership by writing two checks on its money market account." Defendant's defense was that

he "had authority under the partnership agreement to borrow firm funds, [and] that these were partnership investments." The court in *Zinke* reaffirmed "the common law view that a partner could not be convicted of larceny for the misappropriation of partnership assets; because each partner held title to an undivided interest in the partnership, the theory was that partners could not misappropriate what was already theirs."

Zinke is easily distinguishable from the present case. The evidence presented at trial showed that defendant Butcher stole money that belonged to Erwin Rubinstein and Jerome Allen. This money did not belong to the partnership. This money was distributed by the Flint-Woodcrest Apartments Limited Partnership to the investors. Defendant Butcher wrongfully obtained the distributions intended for Rubinstein and Allen, and converted them to his own use. The evidence fully supported the jury's verdict convicting defendant on Counts Three through Seven. Accordingly, *Zinke* has no application to this case. For these reasons,

IT IS ORDERED that defendant's motion for reconsideration is denied.

SO ORDERED.

Dated: JUN 27 1990

/s/ Bernard A. Friedman
BERNARD A. FRIEDMAN
UNITED STATES
DISTRICT JUDGE

No. 90-1745

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ALEXANDER MICHAEL BUTCHER, Defendant-Appellant	)	ORDER (FILED JULY 9, 1991)

BEFORE: KENNEDY and MARTIN, Circuit Judges; and ENGEL, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

UNITED STATES OF AMERICA,	CRIMINAL NO.
Plaintiff,	VIO: Counts 1-4: 18 U.S.C. §1341 Counts 5-7: 18 U.S.C. §2314
-vs-	
ALEXANDER MICHAEL BUTCHER,	HONORABLE
Defendant.	

_____/

INDICTMENT

THE GRAND JURY CHARGES:

COUNTS ONE THROUGH SEVEN

That between in or about January of 1985 and in or about August of 1987, in the Eastern District of Michigan and elsewhere ALEXANDER MICHAEL BUTCHER, defendant herein, did knowingly willfully and unlawfully devise and execute a scheme to defraud and to obtain money by means of false and fraudulent pretenses representations and promises in the manner and means as follows:

1. In May of 1971 the Flint-Woodcrest Apartments Limited Partnership was formed for the purpose of acquiring and owning a 458 unit apartment complex known as Woodcrest Villa Apartments located at 8300 Woodcrest Drive, Westland, Michigan. One of the general partners of the limited partnership was ALEXANDER MICHAEL BUTCHER.

2. RBA Investments was a limited partnership between attorneys Erwin A. Rubenstein, Jerome Allen and ALEXANDER MICHAEL BUTCHER. BUTCHER was a general partner in RBA Investments and Rubenstein and Allen were both limited partners and each owned a one-third interest in the limited partnership. The partnership was formed for the purpose of making investments in such things as real estate ventures. Upon sale or dissolution of any of the investments each partner was entitled to a return of capital and one-third of any of the profits.

3. In July of 1972 RBA Investments purchased an interest and became a limited partner in the Flint – Woodcrest Apartments.

4. Prior to 1986 the Woodcrest Villa Apartments were sold resulting in the Flint – Woodcrest Apartments Limited Partnership being dissolved. Distributions were made to RBA investments of their interest in the Flint – Woodcrest Apartments limited partnership. The initial distribution of $139,850 was made in February of 1986 and the final distribution of $19,105.52 was made in June of 1987.

5. As a general partner of RBA Investments ALEXANDER MICHAEL BUTCHER owed a duty to the limited partners to distribute the proceeds received from the dissolution according to the interest of each limited partner.

6. Upon receipt of the RBA Investments funds from the dissolution of the Flint – Woodcrest Apartments limited Partnership, ALEXANDER MICHAEL BUTCHER converted the funds of the limited partners to his own use.

COUNT ONE

(18 U.S.C. §1341 – Mail fraud)

That on or about March 26, 1985, ALEXANDER MICHAEL BUTCHER, defendant herein, for the purpose of executing and concealing the scheme to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises and attempting to do so, did knowingly place and cause to be placed in an authorized depository for mail matter, to be sent and delivered by the United States Postal Service according to the directions thereon a letter addressed to Jerome Allen, in the Eastern District of Michigan; in violation of Section 1341, Title 18, United States Code.

COUNT TWO

(18 U.S.C. §1341 – Mail Fraud)

That on or about March 8, 1986, ALEXANDER MICHAEL BUTCHER, defendant herein, for the purpose of executing and concealing the scheme to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises and attempting to do so, did knowingly place and cause to be placed in an authorized depository for mail matter, to be sent and delivered by the United States Postal Service according to the directions thereon a letter addressed to RBA Investments c/o A. Butcher containing a check in the amount of $1,150 payable to Butcher and RBA, which was sent from the Eastern District of Michigan; in violation of Section 1341, Title 18, United States Code.

COUNT THREE

(18 U.S.C. §1341 – Mail Fraud)

That on or about July 6, 1987, ALEXANDER MICHAEL BUTCHER, defendant herein, for the purpose of executing and concealing the scheme to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises and attempting to do so, did knowingly place and cause to be placed in an authorized depository for mail matter, to be sent and delivered by the United States Postal Service according to the directions thereon a letter addressed to Alfred E. Klein, which was sent from the Western District of Michigan; in violation of Section 1341, Title 18, United States Code.

COUNT FOUR

(18 U.S.C. §1341 – Mail Fraud)

That on or about July 10, 1987, ALEXANDER MICHAEL BUTCHER, defendant herein, for the purpose of executing and concealing the scheme to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises and attempting to do so, did knowingly place and cause to be placed in an authorized depository for mail matter, to be sent and delivered by the United States Postal Service according to the directions thereon a letter addressed to ALEXANDER MICHAEL BUTCHER, in the Western District of Michigan; in violation of Section 1341, Title 18, United States Code.

COUNT FIVE

(18 U.S.C. §2314 – Interstate Transportation of Stolen Money

That on or about March 12, 1986, ALEXANDER MICHAEL BUTCHER, defendant herein, did knowingly and unlawfully, transport and transmit in interstate commerce money in the form of a wire transfer of funds in the amount of $125,000, from the Harbor Springs State Bank in the state of Michigan to the Federal Reserve Bank in the state of New York, knowing the same to have been converted and taken by fraud; in violation of Section 2314, Title 18, United States Code.

COUNT SIX

(18 U.S.C. §2314 – Interstate Transportation of Stolen Money)

That between on or about March 25, 1986 and on or about April 30, 1986, ALEXANDER MICHAEL BUTCHER, defendant herein, did knowingly and unlawfully, transport and transmit in interstate commerce money in the form of a check in the amount of $25,000 from the state of Michigan to the state of New York, knowing the same to have been converted and taken by fraud; in violation of Section 2314, Title 18 United States Code.

COUNT SEVEN

(18 U.S.C. §2314 – Interstate Transportation of Stolen Money)

That on or about July 10, 1987, ALEXANDER MICHAEL BUTCHER, defendant herein, did knowingly and unlawfully, transport and transmit in interstate commerce money in the form of a check in the amount of $19,105.52, from the state of Florida to the state of Michigan, knowing the same to have been converted and taken by fraud; in violation of Section 2314, Title 18 United States Code.

THIS IS A TRUE BILL.

_____

FOREPERSON

STEPHEN J. MARKMAN
United States Attorney

/s/ Blondell L. Morey
BLONDELL L. MOREY
Assistant U.S. Attorney
Economic Crime Unit

/s/ F William Soisson
F. WILLIAM SOISSON
Assistant U.S. Attorney

Dated (Illegible)

United States of America vs
DEFENDANT

ALEXANDER MICHAEL BUTCHER
Spring Lake Condominiums, Unit 18
P.O. Box 2386
Petoskey, Michigan 49720

UNITED STATES DISTRICT COURT
for
EASTERN DISTRICT OF MICHIGAN
DOCKET NO 89-Cr-80885-01-DT

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date MONTH DAY YEAR
June 29 1990

___ WITHOUT COUNSEL
However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

XX WITH COUNSEL
EDWARD WISHNOW
(Name of Counsel)

PLEA

___ GUILTY, and the court being satisfied that there is a factual basis for the plea

___ NOLO CONTENDERE,

___ NOT GUILTY

FINDING & JUDGMENT

There being a ~~finding~~/verdict of

XX NOT GUILTY. Defendant is discharged COUNTS 1 and 2

XX GUILTY. COUNTS 3, 4, 5, 6 and 7

Defendant has been convicted as charged of the offense(s) COUNTS 3 and 4: MAIL FRAUD: 18:USC:1341

COUNTS 5, 6 and 7: INTERSTATE TRANSPORTATION OF STOLEN MONEY, 18:USC:2314 as charged in the INDICTMENT

SENTENCE OR PROBATION ORDER

SPECIAL CONDITIONS OF PROBATION

The court asked whether defendant had anything to say why judgment should not be pronounced Because no sufficient cause to the contrary, was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Fifty-Four (54) months on each Count – Count 3, 4, 5, 6 and 7, pursuant to 18:USC:4205 (b)(2). The sentence imposed on counts 4, 5, 6 and 7 are to run concurrent to the sentence imposed on Count 3.

Defendant is ordered to pay restitution in the amount of $86,637.00 to RBA Investments as determined by the Probation Department.

Defendant is ordered to pay a $50.00 special assessment fee on each count for a total of $250.00.

Defendant's bond is continued as Bond on Appeal. Defendant may report to the designated institution upon completion of appeal.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation reduce or extend the period of probation and at any time during the probation period or within a maximum probation period of five years permitted by law may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommended.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

A TRUE COPY
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

BY ILLEGIBLE
DEPUTY CLERK

SIGNED BY

XX U.S. District Judge

___ U.S. Magistrate

/s/ Bernard A. Friedman
Bernard A. Friedman

Date 6/29/90

No. 90-1745

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

District Court
No. 89-80885

ALEXANDER MICHAEL
BUTCHER,

Defendant-Appellant.
_____/

On Appeal From The United States District Court
For The Eastern District of Michigan
Southern Division

PETITION FOR REHEARING AND SUGGESTION OF EN BANC HEARING

ROBERT E. BUTCHER (P 11478)
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PETITION FOR REHEARING AND SUGGESTION OF EN BANC HEARING

ALEXANDER MICHAEL BUTCHER, Defendant and Appellant herein, petitions this Honorable Court for a rehearing of his appeal and suggests rehearing by the Sixth Circuit Court of Appeals **en banc**, and in support of

such petition, shows unto this Honorable Court as follows:

ATTORNEY'S CERTIFICATE

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the United States Court of Appeals for the Sixth Circuit and/or the Supreme Court of the United States and that consideration by the full Court is necessary to secure and maintain uniformity of decisions:

1. *U.S. v Stoddard*, 875 F.2d 1233 (6th Cir. 1989);

2. *U.S. v Cusmano*, 659 F.2d 714 (6th Cir. 1981);

3. *Wilcox, D.O., P.C. Emp. Pen. Tr. v U.S.*, 888 F.2d 1111 (6th Cir. 1989);

4. *Grady v Corbin*, 110 S.Ct. 2084 (1990);

5. *Green v U.S.*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957);

6. *Jackson v Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979), 61 L.Ed.2d 560;

7. *Justices of Boston Municipal Court v Lydon*, 466 U.S. 294, 104 S.Ct. 1805 (1984);

8. *Richardson v United States*, 468 U.S. 328, 104 S.Ct. 3081 (1984), 82 L.Ed.2d 242;

9. *United States v Halper*, 109 S.Ct. 1892 (1989); and,

10. *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves these questions of exceptional importance:

1. Whether 18 USC § 1341 can be violated where a party lawfully receives funds, but thereafter allegedly converts those same funds?

2. Whether 18 USC § 2314 can be violated where funds are alleged to have been converted after first being transmitted in interstate commerce?

/s/ Robert E. Butcher
Robert E. Butcher (P 11478)

Attorney of record for:
Defendant Alexander M. Butcher

I.

PETITIONER HAS BEEN CONVICTED OF CHARGES NOT CONTAINED IN THE INDICTMENT

Petitioner was a partner in RBA Investments co-partnership which was formed in 1972. He became a general partner of Flint-Woodcrest Apartments Limited Partnership ("FWALP") in 1972. He became the sole general partner of RBA Investments limited partnership upon its formation in October of **1974**. Copies of the Indictment and the panel's May 23, 1991 Opinion are attached. The Indictment, paragraph 3, charges that "In July of 1972 RBA Investments [limited partnership] purchased an interest and became a limited partner in the Flint-Woodcrest Apartments [limited partnership]." The only thing wrong with this statement is that RBA Investments

limited partnership was not in existence in July of 1972. It was formed on October 31, **1974**. See Exhibit 9.[1]

Petitioner was charged with converting the **funds** of the RBA Investments limited **partners** after receiving funds due to RBA as the sole general partner of that limited partnership. See paragraph 6 of Indictment. He was convicted of "wrongfully converting" funds paid to RBA in which proceeds the RBA limited partners "had an interest". See p 4 of Opinion, lines 2 and 3.

Petitioner filed a Motion to Dismiss, prior to trial, and Rule 29 Motions for Judgment of Acquittal, upon the conclusion of the Government's proofs, in which he argued that he could not possibly be guilty of converting funds belonging to the RBA limited partners, or transporting them in interstate commerce, because the limited partnership did not purchase the interest in and become a limited partner in FWALP, as alleged, and because it was not in existence in 1972 and because, even if it had purchased such interests, any funds received by the limited partnership are partnership funds. The Government and the panel concede the point and now claim the limited partners "had an interest in" the funds, not that they owned them.

In this connection, the Supreme Court has stated in *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 1073 (1970):

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process

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[1] Government exhibits are numbered; Defendant's exhibits are lettered.

> Clause protects the accused **against conviction except upon proof beyond a reasonable doubt** of **every fact necessary to constitute the** crime with which he is charged." (Emphasis supplied).

In *Jackson v Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 2787 (1979), 61 L.Ed.2d 560, the court stated:

> " . . . In short, *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt **of the existence of every element of the offense.**" (Emphasis supplied).

The Government has not proved its charge that the RBA limited partners owned the funds in question. It now says they "had an interest in the Flint-Woodcrest proceeds paid to RBA." and Defendant was convicted of "wrongfully converting **those** funds,". The Government has not even proved that the limited partnership owned the funds. The co-partnership was the record owner of the FWALP interests. Obviously, if RBA Investments limited partnership was not the owner of the interests in FWALP, Petitioner could not possibly be guilty of converting either the funds of the limited partnership or the limited partners.

The evidence introduced at trial relating to ownership of the FWALP interest showed:

1. The FWALP interests were purchased by RBA **co-partnership** (Exhibits K, L), not by RBA Invesments [sic] limited partnership.[2]

2. There was never any assignment of the FWALP interests from the RBA co-partnership to the RBA limited partnership. On the dates of the distributions referred to in the Indictment, in 1986 and 1987, the co-partnership was listed as the owner of the FWALP interest in question (Exhibit K).

3. There was never any written assignment of the co-partnership's interest in FWALP, as required by Michigan law, MCLA 449.1202; MSA 20.1202, and by the FWALP partnership certificate (Exh K). The statute expressly provides that a limited partnership's certificate **"is amended by filing a certificate of amendment" (within 60 days) with the public authority.** The amended partnership agreement (Exh K) requires a written assignment, consented to by the general partners. Para X. There was no assignment, as the panel recognized.

4. Alan G. Thomson, the FWALP accountant, (Jt Appx 301) was of the opinion at the time the distributions were made by FWALP that the owner of the FWALP interest was the co-partnership, rather than the limited partnership.

5. Government Exhibit 9 indicates that the only capital contribution made to the limited partnership by its partners were the sums of $200 paid by each. There is no claim in the testimony or evidence to the effect that RBA Investments limited partnership ever acquired the FWALP interest or became a limited

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[2] RBA Investments co-partnership and RBA Investments limited partnership had identical names. The co-partnership was dissolved in 1974.

> partner in that limited partnership, either in the manner charged in paragraph 3 of the Indictment or at any time after the limited partnership was formed in 1974. The panel and the government concede that title was in the co-partnership, not the limited partnership.

This Court's panel, p 1 of Opinion, agreed with Petitioner's argument that the limited partnership never acquired the FWALP interest in the manner alleged in paragraph 3 because, of course, the limited partnership was not in existence in July of 1972. The panel accepted Petitioner's claim that the FWALP interest was in fact acquired by the co-partnership, rather than the limited partnership. It conceded that the limited partners were not the owners of the funds under any theory.

The panel then, p 1, appeared to attempt to "resolve" the title question by stating:

> "RBA was later converted to a limited partnership with Butcher as the sole general partner; however, Rubenstein and Allen retained their one-third interest in RBA."

The difficulties with this approach to the problem are that:

> 1. There is no provision under Michigan law for "converting" a co-partnership into a limited partnership.
>
> 2. Both the Government exhibits (Exh 9) and Petitioner's exhibits (Exhs K, L) conclusively show that there was never any transfer of the FWALP interests from the co-partnership to the limited partnership. The co-partnership was the listed owner on the FWALP books (Exh K).

3. Petitioner was not charged with violating the distribution rights of the co-partners under the co-partnership agreement.

4. There is no claim by the Government in the Indictment to the effect that the limited partnership was in effect the same entity as the general partnership, nor was there any claim in the Indictment that the partners in the limited partnership "retained their one-third interest in RBA." There was no evidence whatever regarding the interest held by the partners in the co-partnership or their rights to share in any FWALP distributions. The Government's Exhibit 9 indicates a **separate contribution** to the limited partnership of $200 apiece, when it was formed, but the FWALP interest was never transferred to the limited partnership.

Petitioner's point, made in his briefs and upon oral argument, was simply that if, because it admittedly cannot prove the allegations of paragraphs 3 and 6 of the Indictment that the limited partnership was the original purchaser of the FWALP interest, or that the funds in question belonged to the limited partners, it is now the position of the Government and this Court's panel that **the co-partnership** was the owner of the FWALP interests when the distributions were made, as all exhibits show, then Petitioner cannot be guilty of violating the **limited partnership** distribution agreement. Petitioner has argued throughout that the co-partnership agreement did not contemplate an equal distribution to all co-partners.

When this Court's panel (properly) concluded that the RBA limited partnership never acquired title to the property in question as claimed in paragraph 3 of the Indictment, it should have reversed the convictions

entered in the district court, leaving open the possibility that the Government could refile claiming federal violations as to funds owned by the general partnership and/or its partners. The panel erred because it affirmed Defendant's conviction on the claims contained in paragraphs 2 and 3 of the Indictment that Petitioner somehow violated the distribution provisions of the RBA limited partnership certificate, even after it found that the limited partnership was never the owner of the FWALP interests. The panel affirmed, p 1, on its **assumption** that each partner of **the co-partnership** "contributed approximately $11,000 to the partnership in exchange for a one-third partnership interest.", which is a charge not contained in the Indictment; which is demonstrably false; and, which is not claimed to be the basis for distribution of the co-partnership assets.

The Government's basic premise in this entire matter, apparently adopted by this Court's panel, is absurd. In July of 1972, Petitioner (who was not previously a partner in FWALP) resyndicated FWALP by bringing in 20 investors, each of whom contributed $33,000 and who received in return one Class A-1 limited partnership interest in FWALP. The total new money invested in FWALP was $660,000. One of the 20 new investors was RBA co-partnership.

The 19 other Class A-1 FWALP limited partners who invested in the resyndication handled by Petitioner in 1972, each received back in 1986 and 1987 a total return of $39,155.55, as a return on their respective $33,000 investments. The Government claims, p 4 of the Indictment, that RBA, alone out of the 20 FWALP Class A-1 limited partners, was entitled to receive back the sum of

$158,955.52, rather than $39,155.55, as a return on the $33,000 investment made by RBA co-partnership, and this Court's panel apparently agrees.

The fact of the matter is that RBA (whether the co-partnership or the limited partnership) received back as a return on its $33,000 investment the sum of $39,155.55, exactly the same as the other 19 Class A-1 investors received. See Exhibit 5. In addition, the checks to RBA included the amount of $119,799.97 which was paid to RBA as a Class D partner in FWALP. See Exhibits 5, K, L. Petitioner's co-partners, Rubenstein and Allen, made no contribution whatever to the acquisition of the FWALP Class D limited partnership interest. This interest was negotiated by Petitioner as a reward to him for assuming the status of a general partner in FWALP, thus becoming personally liable for its obligations. This personal liability on this failing enterprise assumed by Petitioner continued for more than 15 years, until FWALP was dissolved in 1987.

There is no claim by the Government in the Indictment, or by this Court's panel, that either Rubenstein or Allen made any contribution whatever to the FWALP Class D limited partnership interest put in RBA's name. There was no claim that there was ever any agreement among the partners in the co-partnership that Rubenstein and Allen would share in any proceeds distributed to RBA as a Class D partner in FWALP. Rubenstein and Allen made no Class D investment; there was no non-monetary consideration running from them to FWALP in the transaction. There is no claim by the Government, and no finding by this Court's panel, that the distribution arrangements under the co-partnership were ever

changed. Indeed, the panel says that "Rubenstein and Allen **retained** their one-third interest in RBA." (emphasis supplied).

Assuming Rubenstein and Allen were entitled to the same proportionate return received by all of the 20 FWALP new investors in the 1972 resyndication, they would have each been entitled, by virtue of their respective $11,000 investments, to a return of $13,051.85. They admittedly received $25,000, p 2 of Opinion, which they divided among themselves; the testimony indicates that they have received several thousand dollars in other money from Petitioner for which they have not accounted to him, or given him credit against their RBA claims.

Obviously, if Rubenstein and Allen were not entitled to any of the distribution made to RBA as a Class D limited partner of FWALP, Defendant's convictions for either improperly obtaining such funds or converting such funds after obtaining them, cannot be sustained. Neither the Government, nor this Court's panel in affirming the convictions, offer or attempt to offer any explanation as to why these attorneys should receive $158,955.52 as a return on their $33,000 cash investment when 19 of their clients, who also invested $33,000, in the same transaction, received back only $39,155.55 (Exh 5). The panel made no finding that either Rubenstein or Allen ever made any investment in or was entitled to any distribution made to the FWALP Class D limited partner. The Government made no such claim.

The offenses charged in the Indictment have not been proved because all evidence shows that the co-partnership was still the owner of the FWALP interest, and it is

the partners' distributions rights under the co-partnership agreement which control, not the provisions of the limited partnership certificate. Defendant was convicted on charges not contained in the Indictment.

II.

THE PANEL'S OPINION REINFORCES PETITIONER'S ARGUMENT THAT COUNTS THREE AND FOUR FAIL TO ALLEGE VIOLATIONS OF THE MAIL FRAUD STATUTE, 18 USC § 1341

The jury acquitted Petitioner of the charges contained in Counts One and Two, and the Court of Appeals panel reversed Petitioner's conviction under Count Seven for lack of evidence, leaving 3 preliminary points which Petitioner requests the Court to keep in mind:

1. The mailings described in Counts Three and Four occurred **in 1987.** One was to Alfred Klein in response to a letter from him. The other was the check sent to Defendant by Mr. Klein (Exh 7).

2. The § 1341 counts are unrelated to the § 2314 counts.

3. Conversion is not an element of the mail fraud statute.

The testimony shows that Petitioner was a partner in the RBA co-partnership formed in 1972. From 1974 through the pertinent dates in 1987, he was both a general partner of FWALP and the sole general partner of RBA limited partnership. As the sole general partner of RBA limited partnership, Petitioner was the only person in the world entitled to **receive** the check for $19,105.52,

the subject of Counts Three and Four. He had no need to illegally utilize the mails in order to obtain the check.

Defendant sent no mailing to either of his partners and made no (mis)representation to either of them as to the small 1987 distribution. Para 5 of the Indictment asserts that Defendant owed a "duty" to distribute the funds after receipt by him. The Opinion of this Court's panel makes no claim that **receipt** of the funds by Petitioner was in any way illegal or wrongful.

This Court's panel holds, as the Indictment alleges, that Petitioner was convicted for wrongfully converting the $19,105.52 received by him in 1987. A scheme to convert is not an offense under § 1341. See *U.S. v Beall*, 126 F.Supp. 363 (1954). Defendant did not convert to his own use the $19,105.52 received by him, referred to in Counts Three and Four. He did not **obtain** the check wrongfully. He **unquestionably paid his partners more than $25,000 of his own funds, in May and June of 1986, more than one year before he received the $19,105.52 in 1987. (See Gov't Exh 10).** There was no "taint" to this money because all of the money received from FWALP in 1986 had previously been wired out of the state some 2 or 3 months previous. See Counts Five and Six. He owed the partners no more than $13,051.85 each. Nothing in the panel's Opinion justifies any ruling that the limited partners were entitled to a share of the FWALP Class D distribution.

There is no evidence that Defendant converted the $19,105.52 to his own use; there is no evidence or claim that **that money** was ever illegally transported out of the State of Michigan. Petitioner simply took the position that

he owed nothing to Rubenstein and/or Allen out of the 1987 distribution. The most that can be argued by the Government is that Defendant refused to pay the partners, under a claim of right.

The Government must prove that Rubenstein and Allen were entitled to part of the FWALP Class D partnership distribution before Defendant can be convicted of converting any part of **those** funds. This it has not done.

III.

THE PANEL'S OPINION REINFORCES PETITIONER'S ARGUMENT THAT COUNTS FIVE AND SIX FAIL TO ALLEGE VIOLATIONS OF THE INTERSTATE TRANSPORTATION STATUTE, 18 USC § 2314

Since Petitioner has been acquitted on Counts One, Two and Seven, we again ask the Court to keep in mind:

1. The interstate transportations occurred in 1986, one year before the mailings described in Counts Three and Four.

2. Conversion is not an element of 18 USC § 2314.

This Court's panel dismissed Count Seven of the Indictment, stating, p 4:

> "However, as to Count VII, there appears to be insufficient evidence to have establihed [sic] that the $19,105.52 **was stolen at the time it was transported** from Florida to Michigan." (Emphasis supplied).

Having made this eminently correct ruling, the panel then neglected to apply its own reasoning to the other § 2314 charges contained in Counts Five and Six. The

$150,000 transported in interstate commerce in March of 1986 had not been stolen, converted, or obtained by fraud at the time of the interstate transportations.

The panel asserts that Petitioner was convicted for wrongfully converting the proceeds of the funds paid by FWALP to RBA, p 4. In this, the panel was in error. Neither Count Five nor Count Six accuse Defendant of conversion. There is no such federal offense. Defendant was acquitted of all criminal charges based upon events which occurred before the wiring of the funds in question.

On p 2, the panel describes the alleged conversion by stating "Butcher then used the full amount to satisfy a personal debt." What the panel failed to point out is that Petitioner paid this personal debt to his creditor **in the State of New York** (Gov't Brief, p 5) with the funds in question, after the conclusion of the interstate transportation of the funds. Had Petitioner used the full amount to satisfy a personal debt by paying a creditor located within the State of Michigan, he would not thereafter have had the ability to transport those same funds out of the state in interstate commerce.

Since the Petitioner had not yet paid the funds in his possession to another to satisfy his personal debt, at the time he transported the funds in interstate commerce, the funds had not yet been converted, under the panel's specific holding. The funds in question **could not have been converted** at the time of the interstate transportation if Defendant transmitted the funds to New York state, and then, after the completion of the interstate

transportation, paid his personal debt in that state, as the panel found.

The writer does not understand how a person can be convicted for wrongfully converting funds where the jury acquits that person of all charges occurring before the claimed wrongful interstate transportation. § 2314 does not charge conversion.

It is simply impossible for the **same person** charged with or convicted of converting funds to be guilty of a § 2314 violation involving those same funds. If Defendant had converted the funds to his own use before the interstate transportation, he no longer could have the funds in his possession and he could not possibly transport them in interstate commerce. If he has the funds in his possession so as to be able to transport them in interstate commerce, he has not yet converted the funds in question. There is no federal statute prohibiting the interstate transportation of funds by a general partner or by anybody else lawfully in possession of those funds.

When an alleged conversion occurs in another state after the conclusion of the interstate transportation, as the panel found, there is no violation of 18 USC § 2314. See *Loman v U.S.*, 243 F.2d 327 (1957); *U.S. v Poole*, 557 F.2d 531 (1977). The panel was inconsistent in refusing to dismiss Counts Five and Six since the funds had not been converted at the time of their interstate transmission.

IV.

THERE WAS INSUFFICIENT EVIDENCE TO PROVE DEFENDANT'S GUILT, BEYOND A REASONABLE DOUBT, BECAUSE THE ALLEGATIONS OF THE INDICTMENT WERE ADMITTEDLY NOT TRUE

In Re Winship and *Jackson v Virginia*, supra, hold that every essential **fact** must be proved by the Government **beyond a reasonable doubt.** This Court's panel affirmed Defendant's convictions because, p 3:

> "The record includes **substantial evidence** to support the government's assertion that the RBA limited partners had an interest in the Flint-Woodcrest proceeds paid to RBA." (Emphasis supplied).

The fact is that there was **no** valid title evidence to support Defendant's convictions beyond a reasonable doubt. Interest in a Michigan limited partnership is a matter which must be in writing and filed with the proper public authority. MCLA 449.1202; MSA 20.1202. The FWALP certificate and agreement indicates that the RBA **co-partnership** was the owner of record of the FWALP interests on the distribution dates, (see Exhs K, L), as does Government Exhibit 9.

The district court and this Court's panel erred in permitting the Government witnesses to orally attempt to contradict the title documents on file with the public authorities for the State of Michigan relating to ownership of the FWALP interests. Even so, the Government and this Court's panel concede that the RBA limited partnership did not in fact purchase the FWALP interests in July of 1972, because they both concede that the limited partnership was not in existence in 1972. In *Stoddard*,

supra, this Court held that where the Government's case included false testimony, discovered after trial, and the prosecution knew or should have known of the falsehood, a bank's lack of membership in the Federal Reserve System precluded the Government from establishing the element of an offense outlined in the Indictment.

In *Cusmano,* supra, this Court held:

> "Except as to matters of form or surplusage, there is a per se rule prohibiting judicial amendments to the terms of an indictment." (Syllabus 2).

In *Wilcox, D.O., P.C. Emp. Pen. Tr. v U.S.,* supra, this Court held:

> "Because title to automobile held by seller was valid, no transfer of ownership could have occurred until he executed and delivered certificate of title to the vehicle to the new owner." (Syllabus 4).

Oral testimony is not permissible to alter or cancel out the effect of valid title documents required by the respective states.

V.

PETITIONER'S DOUBLE JEOPARDY CLAIM IS NOT BARRED

United States v Sammons, 918 F.2d 592 (6th Cir. 1990), cited by the panel, does not apply to bar the double jeopardy claims raised by Petitioner in this matter. *Sammons* involved a multiple prosecution, in which a defendant was convicted on all counts. In this case, Petitioner

was acquitted by the jury on Counts One and Two, which contain allegations of events occurring first in time.

Under the Supreme Court's holding in *Green*, supra, and other cases cited on p 1, a defendant's prosecution terminates upon a return of an acquittal by a jury. Therefore, Petitioner argued that his subsequent prosecution for any acts or conduct which were charged in Counts One and Two were necessarily within the protection of the Double Jeopardy Clause of the Fifth Amendment because those acts and that conduct were charged in each and every count of the Indictment. This Court's panel apparently found Defendant guilty of wrongfully converting **all of** the funds in question. Since neither § 1341 nor § 2314 include conversion as an element of their respective offenses, Defendant of necessity was found guilty in Counts Three – Six, inclusive, of conduct charged in Counts One and Two, upon which Defendant had already been prosecuted and acquitted.

Carried to its logical conclusion, the panel's apparent holding that the Government can prosecute and convict a person more than once for either the same offense or for "species" of included offenses (See *Grady v Corbin*, p 2093 S.Ct.), by filing multiple count indictments, the Double Jeopardy Clause could have no effective meaning. The Government cannot bring the same charge twice in the same prosecution, *Sanabria v United States*, 98 S.Ct. 2170 (1978); and, it cannot convict a person twice of the same offense, where more than one offense is included within the greater charge, whether the first conviction is on the greater charge, *Harris v Oklahoma*, 97 S.Ct. 2912 (1977), or

on the lesser included charge, *Brown v Ohio*, 97 S.Ct. 2221 (1977).

Respectfully submitted,

/s/ Robert E. Butcher
Robert E. Butcher (P 11478)
Attorney for Defendant-Appellant
3133 Van Horn, P.O. Box 475
Trenton, Michigan 48195
(313) 675-3990

Dated: June 4, 1991

GOVERNMENT EXHIBIT 6

LAW OFFICES

ALEXANDER M. BUTCHER

1231 U.S. 31 N.
P.O. BOX 5000
PETOSKEY, MI 49770

(616) 347-5000

July 6, 1987

Mr. Alfred E. Klein
Alfred E. Klein and Associates, Inc.
1280 S. Pompano Parkway
Suite 14
Pompano Beach, Fla. 33069

Re: Flint Woodcrest Apartments

Dear Al:

This will confirm our telephone conversation last week covering the following:

1. I will take responsibility for the proper disbursement of the distributions to the RBA partnership of funds from the Flint-Woodcrest Apartments per the allocation schedule of April 24 which you mailed to me with your letter of June 3, 1987. Please send the checks to RBA as a Class D Limited Partner ($18,099.97) and as a Class A-1 Limited Partner ($1,005.55) care of me at 1231 U.S. 31 North, Petoskey, MI 49770.

2. You were going to send me my check for $2,011.11 after our telephone conversation.

3. *Final* tax returns, federal and state, should be filed for 1987 and a short letter of explanation should be mailed to the partners with their forms.

4. You have a little over $1,000 in interest to pay for the preparation of a final tax returns and to pay yourself for services to the partnership. I approve of such use of those funds after which you can close up the partnership.

5. I suggest you keep the funds set aside for Dr. McMorrow, in the CD with provision to be able to transfer the funds to Flint-Woodcrest Apartments, Art Klurstein, Mike Jacoby or me in the future in trust for Dr. McMorrow. In the event of your death you do not want the funds to be included in your estate.

I do not have any suggestions at this time for you to locate Dr. McMorrow. You may want to send a form letter to all of the Class A-1 Partners asking if any of them (or their accounts) know how to contact Dr. McMorrow.

Please contact me if you have any questions.

Very truly yours,

/s/ Alexander M. Butcher
Alexander M. Butcher

/rcb
cc: Arthur Klurstein

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

ERWIN A. RUBENSTEIN and
JEROME J. ALLEN,

Plaintiffs,

vs.

Civil Action
No. 88-348-976-CZ

ALEXANDER M. BUTCHER and
ARTHUR KLURSTEIN,

Defendants.

_____/

OPINION

This Court has before it plaintiffs' motion for reconsideration of this Court's ruling on defendant Butcher's motion for summary disposition. This motion is considered without oral argument or responding briefs. MCR 2.119(F)(2). Generally, a motion which presents the same issues previously ruled on will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled, and show that a different disposition of the motion must result from the correction of the error. MCR 2.119(F)(3).

Plaintiffs argue in support of their motion that limited partners may assert personal claims against the general partner of a limited partnership, citing *Adell v Sommers, Schwartz, Silver & Schwartz, PC*, Michigan Court of Appeals docket number 98937 (published July 19, 1988). It appears to this Court that plaintiffs misconstrue this Court's prior ruling.

At the heart of each count of plaintiffs' complaint is the allegation that the defendant general partner misappropriated an asset of the limited partnership, to-wit: proceeds from the sale of an interest in Woodcrest Villa Apartments. To the extent that the limited partners allege that an asset of the limited partnership has been converted, misappropriated, or negligently or fraudulently diverted, the harm is to the limited partnership and the action must be brought on behalf of the limited partnership. Limited partners do not own divided shares so as to allow separate suits for a common wrong. *Tomkovich v. Mistevich*, 222 Mich 425, 429 (1923).

This Court has not ruled that personal actions of the limited partners may not be pled. That issue has not been presented. This Court has ruled only that claims to recover limited partnership assets must be brought by the limited partnership or by a limited partner in a properly pled derivative action.

Therefore, the motion for reconsideration is denied.

HILDA R. GAGE
CIRCUIT JUDGE
HILDA R. GAGE
Circuit Court Judge

Dated: September 7, 1988

FLINT-WOODCREST APARTMENTS
PARTNER ALLOCATIONS
FOR ALLOCATION AS OF APRIL 24, 1987
****

	PARTNERSHIP PERCENTAGE INTEREST	TOTAL CASH DISTRIBUTION	CASH PREVIOUSLY DISTRIBUTED	REMAINING CASH
GENERAL PARTNERS:				
KLEIN	.56250	5,990.00	5,085.00	905.00
JACOBY	.18750	1,996.67	1,695.00	301.67
KLURSTEIN	.50000	5,324.44	4,520.00	804.44
BUTCHER	1.25000	13,311.11	11,300.00	2011.11
	2.50000	26,622.22	22,600.00	4022.22
CLASS A-1 LIMITED PARTNERS:				
TUTAG	2.36250	39,155.55	38,150.00	1005.55
ROSENTHAL	2.36250	39,155.55	38,150.00	1005.55
GOLDMAN	1.18125	19,577.78	19,075.00	502.78
ORTIZ	3.54375	58,733.33	57,225.00	1508.33
AUSTIN	2.36250	39,155.55	38,150.00	1005.55
KARIMIPOUR	1.18125	19,577.78	19,075.00	502.78
HOWELL	2.36250	39,155.55	38,150.00	1005.55
KLASS	2.36250	39,155.55	38,150.00	1005.55
SETTER	2.36250	39,155.55	38,150.00	1005.55
MCMORROW	2.36250	39,155.55	38,150.00	1005.55
CRACCHIOLO	2.36250	39,155.55	38,150.00	1005.55
WOLF	1.18125	19,577.78	19,075.00	502.78
CLARK	2.36250	39,155.55	38,150.00	1005.55
HIPP	2.36250	39,155.55	38,150.00	1005.55
SABBAGH	2.36250	39,155.55	38,150.00	1005.55
MAY & MAY	1.18125	19,577.78	19,075.00	502.78
MATTAR-TEWES	1.18125	19,577.78	19,075.00	502.78
RBA	2.36250	39,155.55	38,150.00	1005.55
DUCMAN	2.36250	39,155.55	38,150.00	1005.55
MATHIS	2.36250	39,155.55	38,150.00	1005.55
SIMEN	2.36250	39,155.55	38,150.00	1005.55
SABO	2.36250	39,155.55	38,150.00	1005.55
	47.25000	783,111.08	763,000.00	20111.08

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GOVERNMENT EXHIBIT 5

FLINT-WOODCREST APARTMENTS
PARTNER ALLOCATIONS
FOR ALLOCATION AS OF APRIL 24, 1987
****

	PARTNERSHIP PERCENTAGE INTEREST	CASH DISTRIBUTION	CASH DISTRIBUTION	REMAINING CASH
CLASS A LIMITED PARTNERS:				
JACOBY	2.45000	56,678.32	55,518.88	1159.44
PALMER	1.22500	28,339.16	27,759.44	579.72
WESTON	1.22500	28,339.16	27,759.44	579.72
GOTTLIEB	1.40000	32,387.61	31,725.07	662.54
PANZER	2.45000	56,678.32	55,518.88	1159.44
HARRIS	2.45000	56,678.32	55,518.88	1159.44
WOLF	2.45000	56,678.32	55,518.88	1159.44
DOLVEN	1.22500	28,339.16	27,759.44	579.72
ROSKY	1.22500	28,339.16	27,759.44	579.72
EVE PRESS	1.40000	32,387.61	31,725.07	662.54
ROSENBAUM	1.22500	28,339.16	27,759.44	579.72
EPSTEIN	1.22500	28,339.16	27,759.44	579.72
SHAPIRO	2.45000	56,678.32	55,518.88	1159.44
E. SHAPIRO	2.45000	56,678.32	55,518.88	1159.44
SYDE	1.40000	32,387.61	31,725.07	662.54
RUBENSTEIN	1.75000	40,484.51	39,656.34	828.17
CHAPNICK	.70000	16,193.81	15,862.54	331.27
KUKLER	2.45000	56,678.32	55,518.88	1159.44
SEIGEL	1.22500	28,339.16	27,759.44	579.72
MALLON	1.22500	28,339.16	27,759.44	579.72
KASLE	1.40000	32,387.61	31,725.07	662.54
	35.00000	809,690.28	793,126.80	16563.48
CLASS B LIMITED PARTNERS:				
KLEIN	9.56250	183,975.58	173,169.90	10805.68
JACOBY	3.18750	61,325.19	57,723.30	3601.89
	12.75000	245,300.78	230,893.20	14407.58
CLASS C LIMITED PARTNERS:				
KLURSTEIN	2.00000	47,919.99	40,680.00	7239.99
CLASS D LIMITED PARTNERS:				
RBA	.50000	119,799.97	101,700.00	18099.97
	100.00000	2,032,444.31	1,952,000.00	80444.31